

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE, TENNESSEE**

United States of America,	:	
	:	
Plaintiff,	:	
vs.	:	Case No. 3:12-cr-171
	:	
Steven Marshall Fout,	:	Sentencing
	:	
Defendant.	:	

Transcript of proceedings before the Honorable Danny C. Reeves,
U. S. District Judge, on February 20th, 2014.

Appearances:

On behalf of the Plaintiff:

Matthew T. Morris, Esq.
U. S. Attorney's Office
Knoxville, Tennessee

On behalf of the Defendant:

Bobby E. Hutson, Esq.
Federal Defender Services, Inc.
Knoxville, Tennessee

Court Reporter:

Donnetta Kocuba, RMR
800 Market Street, Suite 132
Knoxville, Tennessee 37902
(865) 524-4590

I N D E X

Oral Argument re: Defendant's Motion for Downward Departure and/or Variance:

by Mr. Hutson - 6, 33

by Mr. Morris - 25

Court's Ruling on Motion: 34-40Defendant's Statement: 40

<u>Plaintiff's Witness:</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>
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Sentence of the Court: 59Defendant's Objections to Sentence: 68Court addresses Deft.'s Objections: 73

1 (Whereupon, Thursday, February 20th, 2014, Court convened
2 in the following matter at 2:00 p.m.)

3 THE COURT: Thank you. Once again, good afternoon.
4 Madam Clerk, if you could call the matter scheduled for 2:30,
5 please.

6 COURTROOM DEPUTY: Yes, your Honor. We're here
7 for a sentencing in Docket Number 3:12-cr-171, United States of
8 America versus Steven Marshall Fout. Is the Government present
9 and ready to proceed?

10 MR. MORRIS: Matthew Morris present and ready, your
11 Honor. Thank you.

12 COURTROOM DEPUTY: Is the Defendant present and
13 ready to proceed?

14 MR. HUTSON: Bobby Hutson, present and ready.

15 THE COURT: All right. Thank you, counsel. This
16 matter is scheduled for a sentencing hearing this afternoon. Before
17 we proceed with the hearing, I want to first confirm, Mr. Fouts[sic]
18 has had the opportunity to review his pre-sentence report and also
19 to discuss it with his attorney to his satisfaction; is that correct,
20 Mr. Fouts [sic]?

21 MR. FOUT: Yes, sir.

22 THE COURT: Mr. Fouts [sic], your pre-sentence report
23 will be placed in the file, under seal. It is available if you should
24 need it for any reason or if the attorneys should need it for any
25 reason, but it's not available for the general public to review. You

1 do understand that?

2 MR. FOUT: Yes, sir.

3 THE COURT: All right. There are objections to the
4 pre-sentence report that will need to be addressed before we can
5 proceed with the sentencing hearing.

6 I will note for the record that I have reviewed the extensive
7 motion that has been filed on behalf of the Defendant, a motion for
8 downward departure or for a variance from the Advisory Guideline
9 Range, and the sentencing memorandum that's been filed.
10 Likewise, the United States has filed a memorandum in opposition
11 to the Defendant's motion.

12 I have considered those matters, as well as the authorities that
13 have been cited in those memos and will proceed at this time on the
14 Defendant's objections to the report.

15 MR. HUTSON: Your Honor, we did not file an
16 objection to the report, but I would like to be heard in terms of
17 argument in this case.

18 THE COURT: All right. Yes, sir.

19 MR. HUTSON: Would you like me to proceed, your
20 Honor?

21 THE COURT: Yes. I do have a couple of questions for
22 you. I mispoke. It's not objections to the report, but it is a motion
23 for downward departure.

24 MR. HUTSON: And/or variance, your Honor.

25 THE COURT: And/or variance. I've read your

1 memorandum, and it may be helpful if I raise the questions with
2 you in advance that you will be able to address.

3 There is some authority from the Sixth Circuit, rather recent
4 authority, within the past year or so, United States vs. Reilly,
5 which indicates that the only departures that are appropriate for
6 these type of offenses would be departures under 5K. Now,
7 specifically– and I’ll refer you to the guidelines, 5K2.0,
8 Subsection (b), downward departures in child crimes and sexual
9 offenses.

10 Specifically, on Page 454 of the Guideline Manual for 2013, it
11 specifically states that, “The grounds enumerated in Part K of
12 Chapter Five are the sole grounds that have been affirmatively and
13 specifically identified as permissible grounds of downward
14 departure in these sentencing guidelines and policy statements.
15 Thus, notwithstanding any other reference to authority to depart
16 downward elsewhere in this Sentencing Manual, a ground of
17 downward departure has not been affirmatively and specifically
18 identified as a permissible grounds of downward departure within
19 the meaning of Section 3553(b)(2) unless it is expressly
20 enumerated in Part K as a ground upon which a downward
21 departure may be granted.”

22 Now, 5K, of course, contains a number of sections, and
23 specifically Section 5K2.22, that section provides that there are
24 some grounds for departure that can be considered from other
25 chapters, 5H1.1 and 5H1.4. It does not mention 5H1.3, and I do

1 know that in your memorandum you specifically refer to that
2 section as well.

3 But it would appear to me, under the authority that I've
4 mentioned, as well as United States vs. Reilly— and the citation of
5 the Reilly case is 662 Federal 3d 754, it's a 2011 case, and that
6 specifically holds, as indicated in the subsection I've just
7 referenced.

8 It does, of course, indicate that that information can be
9 considered in terms of a variance, but not a departure, and I am
10 referring to the 5H1.3 argument that has been made in the
11 memorandum. So I wanted to alert you to that before hearing your
12 argument on the issue of departure or variance.

13 MR. HUTSON: Thank you, your Honor. Would you
14 like for me to proceed?

15 THE COURT: Yes, sir. Yes.

16 MR. HUTSON: May it please the Court, your Honor,
17 before the Court today is Mr. Steven Marshall Fout. As outlined in
18 our motion for downward departure and variance, Steven asks the
19 Court to impose a sentence below the excessive guideline range
20 currently recommended by the pre-sentence report, which
21 recommends a 12- to 15-year sentence in this case.

22 Specifically, he asks the Court to impose a 60-month
23 sentence, to be followed by a reasonable term of home detention.
24 He leaves that specific term to the sound discretion of the Court,
25 coupled with the stringent conditions of supervised release that are

1 in place for an offender like Steven.

2 THE COURT: As I understand your argument, you're
3 not objecting to the standard conditions of supervised release that
4 have been adopted in this district?

5 MR. HUTSON: That's correct, your Honor.

6 THE COURT: All right.

7 MR. HUTSON: We raise no objection to those
8 conditions.

9 THE COURT: All right. Thank you.

10 MR. HUTSON: In essence, Steven is asking for a split
11 sentence, to be comprised of both a term of imprisonment in a
12 Bureau of Prisons facility in combination with home detention.
13 First and foremost, both Steven and myself certainly appreciate the
14 Court's indulgence in allowing us to file such an extensive
15 sentencing memorandum for these important issues.

16 It's not the typical practice for us to file a memorandum of
17 that length, but this is not the typical defendant in federal court.
18 For purposes of efficiency today, though, your Honor, I'll just
19 briefly highlight some of the most important facts in the case.

20 Your Honor, we submit to the Court that this case does fall
21 outside the heartland of cases normally considered by the
22 sentencing guidelines. I have, just anecdotally speaking, I have
23 spoken with other lawyers in my office, and we typically handle
24 every federal child sex case that comes through town, unless
25 someone retains counsel, and no one has encountered a defendant

1 like Steven. He is different, and he's different for a variety of
2 reasons.

3 Your Honor, it is undisputed that Steven is a legally blind
4 defendant who has pled guilty to possessing and distributing child
5 pornography. Medical records received by probation establish that
6 fact. He has attended the Tennessee School for the Blind and has
7 needed visual assistance since he was nine years old.

8 THE COURT: Which indicates that he had this
9 condition at the time that he committed the offenses.

10 MR. HUTSON: That is correct, your Honor.

11 THE COURT: And if you're successful in your motion,
12 he would continue to have the ability to commit similar offenses
13 based upon his handicap. His handicap would not prevent him from
14 committing those offenses, correct?

15 MR. HUTSON: I would, I would probably characterize
16 that in a different way, in that the conditions imposed by the Court,
17 coupled with a term of imprisonment, would be sufficient in
18 addressing both the statutory factors and the departure provisions.
19 But I understand—

20 THE COURT: Well, wasn't he being supervised by his
21 mother and grandmother at the time that he committed these
22 offenses?

23 MR. HUTSON: He was living in her home, and as I will
24 mention in the next section, your Honor, they, when this occurred
25 in 2009— mind you, that was almost five years ago— Steven's family

1 cooperated with authorities. They handed over the computer. No
2 one attempted to hide or conceal evidence from authorities. They
3 were not aware that Steven was downloading child pornography.

4 THE COURT: And I guess that's my point. He was able
5 to avoid detection notwithstanding his physical impairments. He
6 was able to commit the offenses that he's here today, in light of the
7 fact that he had these conditions and he had supervision by his
8 family, and they didn't know what he was doing. They didn't
9 realize he was doing this.

10 MR. HUTSON: Yes, your Honor. But I would also add,
11 though, that once that occurred, that there doesn't appear to be any
12 evidence that he downloaded child pornography following that
13 event, when they had him under supervision, knowing that he was
14 downloading child pornography.

15 Now, the Government has-- the pre-sentence report alleges
16 that he may have been involved in chat room activities, but,
17 nevertheless, there's no indication that he re-offended with the
18 offense conduct that he's here for today following that 2009,
19 intervention between law enforcement and Steven.

20 Additionally, your Honor, Steven cannot drive a car to the
21 store, he can't drive to a playground, he can't drive to the mall, he
22 can't go from Point A to Point B without some type of help,
23 without some type of supervision from an adult, and he's been that
24 way for almost 15 years.

25 And so this is an ongoing issue that did not just develop at the

1 onset of a federal case, but an issue that has existed since he was a
2 child. Most of Steven's medical issues can be traced to the trauma
3 he experienced as a child.

4 At nine years old, he was diagnosed with brain cancer, a rare
5 form of brain cancer. He lost most of his sight due to a tumor that
6 grew on his optic gland. Steven was also chemically sterilized due
7 to the intense chemotherapy treatments that he received as a child.
8 Fortunately, he was able to go into remission, but he still requires
9 assessments to examine the tumors in his head.

10 The family has indicated that any fall or blow to his head
11 could create a serious, if not fatal, situation for Steven, given the
12 fact the tumors can rupture, hemorrhage inside of his brain.

13 THE COURT: Now, you're not arguing that he couldn't
14 receive proper assessments at a medical facility, a federal medical
15 facility?

16 MR. HUTSON: Your Honor, I'm not aware that the
17 Bureau of Prisons is able to handle a person just like Steven. I
18 can't, I can't say today that I'm confident that the Bureau of
19 Prisons will be able to carry out, at the stay of a defendant like
20 Steven, for which the guidelines recommend, 12 to 15 years.

21 THE COURT: Well, is your argument irrelevant if the
22 Court sentences him to a term of 60 months? He's still going to be
23 subject to falling and injuring himself just as much as he would at
24 some more lengthy term of incarceration.

25 MR. HUTSON: Well, I think, just in terms of the term

1 itself, the longer he is in prison, the more likely it is that he will be
2 subject to abuse or a fall, and the Court has a mandatory minimum
3 that is present in this case that we can't argue against. So that
4 would be our rationale for raising the issue in that manner.

5 Additionally, your Honor, Steven's status— and this goes to
6 your Honor's last question— Steven's status as a blind defendant
7 who is convicted of a child pornography offense, would create
8 potentially a serious safety risk for Steven in a Bureau of Prisons
9 facility.

10 It is not unreasonable to assume that a defendant like Steven
11 will be subject to abuse as a federal inmate. He is five-foot-two,
12 and I believe he weighs approximately 125 pounds— 116 pounds,
13 rather, today, your Honor. And, with all due respect to Steven, he
14 does have a meager physical appearance and traits. This, coupled
15 with a disability, makes him particularly vulnerable to a plethora
16 of assaults, including both sexual assaults and non-sexual assaults,
17 as a federal inmate.

18 A split sentence, though, that includes home detention, will
19 not only punish Steven for the offense conduct in this case, but it
20 will also properly balance his history and characteristics as it
21 relates to this specific case.

22 And as the Court is aware, home detention is punishment, is
23 long considered to be punishment, and that is especially true when
24 you have a defendant like Steven, who, it's undisputed, he has both
25 learning and physical limitations. The pre-sentence report actually

1 notes that he is considered to be a low, borderline, low-functioning
2 adult male.

3 THE COURT: That, standing alone, would not be
4 sufficient for a departure. Many defendants that appear before the
5 Court have learning disabilities, and quite a few have substantial
6 physical disabilities. I believe your argument is, it's the
7 combination of all these factors; is that correct?

8 MR. HUTSON: That's correct, your Honor. And that's
9 our rationale for raising the issue in 5.K, which is a combination—
10 does raise the issue of whether the combination of one's physical
11 and mental characteristics could warrant a departure.

12 But, as the Court noted at the beginning of the hearing, we're
13 not making a single request related to a departure. These same facts
14 should also be considered with the statutory factors, which may be
15 a better analysis for the Court in terms of reaching a decision in
16 this case. But we ask the Court to consider both of those for
17 Steven.

18 Your Honor, as noted by the pre-sentence report and our
19 memorandum— and I did discuss this with Steven before the
20 hearing, because the memorandum was sealed. He did give me
21 permission to speak on these issues today with the Court.

22 But, as the Court knows, Steven was violently raped by a
23 person that was entrusted to protect him, his stepfather. This was
24 during the same year that Steven was battling brain cancer as a
25 little boy. Not only did Steven have to endure the legal stress of

1 convicting a parent of rape, but he also had to fight for his life,
2 knowing that he is a victim of rape.

3 And so these events in his life have left him wounded. He has
4 post traumatic stress disorder, depression, anxiety, he is
5 symptomatic of bipolarism; and these issues together create a
6 person who needs attention, who needs counseling and medication,
7 which he is currently receiving at the local facility.

8 THE COURT: Don't those conditions also indicate a
9 greater likelihood of recidivism, an individual who's been sexually
10 abused, who then strikes out at the most vulnerable and sexually
11 abuses those individuals, or would like to, or possesses child
12 pornography which is of the worst kind?

13 The pornography that's described in this case is really the
14 worst of the worst. It's a very aggravating factor; it's not a
15 mitigating factors. It's horrendous, and I don't want to even
16 describe it, but it's certainly described in the pre-sentence report.

17 MR. HUTSON: It is, your Honor, and he is aware of the
18 horrific nature of this crime. I would say that courts have, and this
19 is touched upon in the memorandum, courts have viewed child
20 pornography differently than they have, for instance, an
21 enticement case, where an individual can actually go after a six-
22 year-old and her, quote, mother and have a guideline sentence of
23 eight years or a statutory minimum of ten years. That's the reason
24 courts find these guidelines so unreliable in determining whether a
25 specific sentence should be attached to a specific defendant.

1 THE COURT: That argument's often made, that the
2 guidelines really don't reflect the nature of the offense. And
3 there's an article that was written by Alexandra Gelber a couple
4 years ago. She's with the Department of Justice, in the criminal
5 division in Washington, and her article is captioned "A Response
6 to 'A Reluctant Rebellion.'"

7 Now, that "Reluctant Rebellion" was an article that appeared
8 in an ABA Journal back in June of 2009, and it basically attacked
9 the guidelines as creating a very harsh sentencing environment
10 with the enhancements that are applied for a variety of things using
11 a computer, number of images, sadistic images.

12 And she goes through literally and explains the reason for
13 each one of those adjustments that are made, and she does an
14 excellent job in doing so. I would certainly refer you to her article.
15 It's very good.

16 And I would also refer you to an opinion, a couple of
17 opinions. Recently, from the Sixth Circuit, I think a couple of these
18 are actually referenced in the memos that have been filed. One is
19 from Judge Kethledge— I believe actually two from Judge
20 Kethledge, the Bistline case, the two cases.

21 That was a series of cases in which Judge Graham decided that
22 an elderly defendant really didn't deserve any jail time at all, and I
23 guess you'd call it a judicial smack-down. Judge Kethledge, the
24 first time, threw— or reversed the case and told the district judge
25 that Congress really intended to— that it meant what it said in these

1 cases, that these are serious cases and they should result in serious
2 punishment.

3 Judge Graham didn't do that the second time, and the case,
4 when it was remanded the second time, the case was taken away
5 from him for sentencing before another judge.

6 And then, in another opinion, Shultz case– I believe it was a
7 case from Tennessee, as a matter of fact– involved supervised
8 release terms, but I believe Judge Sutton, in that case, really
9 discusses congressional intent as well, and there are several cases
10 in which that occurs.

11 But hasn't the Sixth Circuit really come full circle in the last
12 couple of years, and they've taken a more serious look at the
13 guidelines with regard to these type of offenses?

14 MR. HUTSON: Your Honor, I would respectfully
15 disagree with some of those cases and positions by the Sixth
16 Circuit in that the Supreme Court has determined that the statute is
17 the most important, the statutory factors.

18 And in many of the cases– and I won't begrudge the Court by
19 going through the statistics that we've already presented, these
20 enhancements are implied in every case for the most part. In every
21 case, mostly every case that I have, the same enhancements are
22 present in the same case regardless– all child pornography is
23 horrendous; that is another undisputable fact.

24 But at the same time, when the enhancements are applied in
25 every single case, it doesn't have the– that doesn't create an

1 individualized determination of whether a sentence is appropriate
2 post-Booker. And so I believe that's where the tension lies between
3 one side of the argument, where this is a horrible offense and we
4 have to aggressively apply every enhancement regardless of, you
5 know, of the Defendant's history and characteristics.

6 Because the guidelines are not anticipated to address a legally
7 blind defendant who is confined to his home. He's not the typical
8 defendant described in the guideline.

9 And while I respect the opinion of the person with the
10 Department of Justice who filed the article– and I'll certainly
11 review that– I do respectfully disagree with that position. And
12 maybe I can address some of those issues further along in the
13 argument, your Honor.

14 Steven's history is not just this happened to him. It's this
15 happened to him, this happened to him, this happened to him; and it
16 has created a person who is anything but intellectually superior to
17 the normal person. Steven is competent to be here today, there's no
18 question of that, but Steven is not a normal defendant.

19 And I understand the Court's argument about, yes, we see a
20 lot of defendants who may be struggling and in a variety of areas,
21 and oftentimes my clients are not the smartest people to deal with.
22 But, at the same time, Steven, the multiplicity aspect of Steven's
23 history and characteristics does, in my opinion, present the Court
24 with a different type of case.

25 THE COURT: Are we given some insight, with the

1 Internet chat, with his intellectual capacity, his ability to
2 communicate with others on these particular issues? Not a low-
3 functioning communication; he was able to carry on some— I don't
4 want to call it sophisticated, but the Internet chats were not what I
5 would call low-functioning.

6 MR. HUTSON: Your Honor, I would make two points
7 for that. The pre-sentence report classifies those Internet chats as
8 allegations, and Steven is not here today to stipulate to any
9 additional criminal conduct that has been alleged.

10 THE COURT: No. And I'm not referring to it in that
11 way. But it really addresses your argument of his intellectual
12 capacity. He's not the low-functioning individual that you argue
13 that he is based upon that type of— that ability to communicate.

14 MR. HUTSON: Your Honor, I have read the chats, and
15 while I understand there's a section of the chats, assuming
16 arguendo, Steven is carrying out these chats, just hypothetically
17 speaking, there is, in the chats itself, from my reading of the chats,
18 yes, some of it is horrible, there's no question about that.

19 But then other parts of it make absolutely no sense. There are
20 exchanges between the individuals where Steven is really, you
21 know, theoretically, responding in a way that's even responsive to
22 the commentary that's going back and forth. So I'm not sure that
23 saying the chats make him a more culpable defendant, I'm not
24 saying I would necessarily agree with that, given the entirety of the
25 chat itself.

1 So, your Honor, I understand the Court would want to
2 consider those issues, but, again, Steven, Steven does not stipulate
3 to any other allegations that may have been raised by the pre-
4 sentence report, because they are raised as allegations.

5 Your Honor, I would also note that, you know, when Steven
6 was an adolescent, he was subject to intense bullying at school
7 based on the things that we're arguing about, his physical and
8 emotional and learning disabilities. Those issues created a volatile
9 atmosphere for Steven at school.

10 Steven routinely was tortured by classmates. He would come
11 home, he would have visible bruises on his body. He would have
12 red handprints embedded on his face from being abused by
13 classmates.

14 THE COURT: None of that is going to change
15 regardless of the sentence that's imposed here today. It's
16 unfortunate, I certainly agree with you, that's unfortunate. That
17 should never happen; children should not be abused. Sometimes,
18 though, attorneys forget who the true victims are in these cases.

19 The victims in these cases are the children in those pictures,
20 the toddlers that are being abused. It's Steven years ago. He went
21 through the abuse, and he's been broken. He's competent, but we
22 have a broken child who becomes a broken adult, who creates and
23 who engages in terrible conduct.

24 The sentence that's imposed here today will not change that.
25 You can't go back and take away the bruises or the marks, the

1 things that have happened. If anything, the abuse is an indication
2 that in the future he's likely to commit other abusive conduct
3 toward children. He acts out, he acts out toward those that are more
4 vulnerable than he is. That's been his history.

5 So that's the problem here, is the fact that— and I understand
6 your argument. Your argument is, the Court should essentially give
7 him credit or give him some time off because he was abused as a
8 child. But we're not going to change that by reducing his sentence.
9 He's still going to be the same person.

10 His characteristics will not change, the likelihood that he
11 would reoffend are not going to change, by a lesser sentence.
12 Treatment may be helpful, but I don't see how a lesser sentence
13 will change any of that or cause him to be less likely to re-offend.

14 MR. HUTSON: Your Honor, I guess I would answer
15 that with three points, and the first point is that the history and
16 characteristics of Steven as being a vulnerable defendant, we
17 suggest, should be a part of the Court's analysis in the case.

18 A 60-month sentence in a Bureau of Prison facility is more
19 dangerous to Steven than a 12- to 15-year sentence for Steven. Just
20 by the numbers alone, with Steven being subject to an extended
21 term of imprisonment, there is more likelihood that Steven will be
22 attacked, abused, assaulted. So the Court does have discretion
23 today to change some of those issues with the sentence in the case.

24 And, secondly, your Honor, and just for purposes of the
25 record, Steven objects to any prior acts of acting out. And we also

1 disagree that that is necessarily a telltale sign that someone will act
2 out again. There are defendants who have been abused and never
3 act out.

4 And so, just for purposes of the record, the pre-sentence
5 report actually identifies those as allegations—

6 THE COURT: Aren't you arguing against yourself?

7 MR. HUTSON: How so, your Honor?

8 THE COURT: Well, part of the argument that you make
9 either for a variance or for a departure is based upon the actions
10 that have taken place previously in his life, including being raped
11 by a stepfather.

12 And your argument is that that may have caused some of his
13 actions that he's convicted of; children that are abused abuse
14 others. He was abused as a child. That may have led to the
15 pornographic material that he was observing, he possessed and
16 distributed, of children being abused.

17 So, as I understand, your argument— correct me if I'm wrong—
18 but I understand your argument to be, because of those actions as a
19 child, this resulted in his conviction, the actions that he took that
20 resulted in his conviction.

21 But you're also saying, well, there's no guarantee that he
22 would re-offend or that he would act out in the future. You're
23 saying there's no relationship. On the one hand, you're saying
24 there is a relationship, and then you're saying, well, it really isn't a
25 relationship that the Court can count on.

1 MR. HUTSON: Your Honor, I would, I would
2 respectfully disagree with that, in that we have, in our filings, have
3 never stated that because Steven was abused he committed child
4 pornography. The statute requires us to examine the history and
5 characteristics of the Defendant, and these, this history and
6 characteristics of Steven, are important.

7 And I wouldn't be worth two salts as a lawyer if I did not
8 bring the Court's attention to the things that have happened to
9 Steven in his life. We have never taken the position that Steven's
10 history created an atmosphere where he decided to download child
11 pornography, but it is a part of who he is and it's a part that I can't
12 change for him.

13 I would also add, your Honor, that, in this case, that Steven
14 has accepted responsibility for downloading child pornography,
15 again, child pornography that was downloaded nearly five years
16 ago. In that instance, your Honor, the Court is also required to look
17 at the deterrent effect, under the sentencing statute.

18 In terms of that, your Honor, Steven did not seek pretrial
19 release, Steven did not create any additional issues for the
20 Government. He immediately, as mentioned, accepted
21 responsibility not only at the scene in 2009, but when he was
22 indicted in federal court.

23 Steven understands that downloading child pornography is a
24 horrific offense, and he has— and he intends to never re-offend with
25 that offense again, your Honor. Most importantly, as I alluded to

1 in terms of the deterrent part of those facts, under 3553, the fact
2 that these events occurred five years ago, when he was 19 years
3 old, approximately 19 years old, I believe— and now he's a 23-year-
4 old— a significant amount of time has passed from the offense
5 conduct to date.

6 Consequently, your Honor, it appears that the deterrent aspect
7 of the sentencing statute could be satisfied, given the facts of this
8 specific case. Your Honor, regardless of how we look at this case,
9 the source of the problem is the Internet, the computer. That's the
10 source of the problem.

11 The statute requires that the sentencing court pronounce a
12 sentence that is not greater than necessary. Aside from the
13 guidelines, the statute requires that the sentence not be greater than
14 necessary to achieve the statutory purpose of 3553. Respectfully, if
15 the Court were to impose a five-year sentence followed by a
16 significant or extended term of home detention, which is— includes
17 the stringent conditions of supervised release for a sex offender, it
18 appears that the purpose of 3553 could be satisfied in this case.

19 Stated a different way, a sentence of 12 to 15 years seems to
20 be greater than necessary for a legally blind defendant who cannot
21 even visit the grocery store without some type of assistance. It
22 seems as if ordering him to be confined at his home, with
23 monitoring and supervision or any other condition that the Court
24 feels would be appropriate could be a reasonable sentence in this
25 case.

1 Your Honor, the guidelines are helpful in many cases, but in
2 this case they simply do not contemplate a defendant that has the
3 combination of history and characteristics as Steven.

4 Also, your Honor, I won't go on about this issue, but there are
5 serious disparities in these types of cases. And I respect the Sixth
6 Circuit and their opinions regarding to the Bistline case and its
7 progenies, but at the same time there are many other districts and
8 courts that have found that the Sentencing Guidelines do not
9 provide a proper basis for a criminal defendant in terms of child
10 pornography offenses.

11 Certainly, the Court would not be creating any new precedent
12 per se if the Court granted a variance of some kind in the Sixth
13 Circuit related to the statutory factors. Your Honor, Steven is, as
14 mentioned, he's vulnerable to abuse in the system. An extended
15 term of imprisonment will only prolong that period of time in
16 which he is subject to abuse.

17 He requires both mental and psychological treatment and has
18 the supportive framework of family members that love and support
19 him. Your Honor, his family would assist the Court in any way
20 needed to insure that he is compliant with all terms of supervision,
21 including any additional orders by the Court.

22 They are here today and can certainly answer any questions
23 the Court may have, if necessary. They are willing to completely
24 restrict Steven's Internet usage, computer usage, whatever the
25 Court needs to satisfy the statutory factors of 3553.

1 They're also willing to pay for ankle monitoring, to take him
2 to sex offender treatment, which, my understanding is, sex
3 offender treatment is voluntary within the Bureau of Prisons, but
4 once an individual is released, it becomes mandatory. And so that
5 may give the Court the option of getting Steven treatment faster in
6 a way in which he can become a different person and, hopefully, be
7 a contributor to society.

8 Your Honor, based on these reasons and those found in our
9 sentencing memorandum, Steven asks the Court to impose a
10 sentence of 60 months, followed by a reasonable term of home
11 detention. He has raised no objection to the special conditions, as I
12 mentioned earlier, and he's ready to fulfill those obligations.

13 THE COURT: All right.

14 MR. HUTSON: Finally, your Honor, I have two last
15 points, if I could. The first is, is that, pursuant to Booker and its
16 progenies, the Court has a great deal of flexibility in how to handle
17 this case. Theoretically, for example, if the Court were to sentence
18 Steven to five years and follow that with a seven-year term of home
19 detention with supervised release and special conditions, that
20 would in essence equate the same amount of confinement for— that
21 is represented by the guidelines.

22 Of course, the Court would likely have to vary, but at the
23 same time, your Honor, there is a way for the Court to fashion a
24 sentence in this case that takes into account the entire landscape of
25 the facts before the Court.

1 And, lastly, your Honor, clearly, the decision by the Court
2 today is going to have an enormous impact on Steven's family and
3 Steven himself. And the family certainly recognizes the difficult
4 nature of the issues before the Court today, and they sincerely
5 appreciate the Court's consideration of Steven's request. Thank
6 you.

7 THE COURT: All right. And thank you for responding
8 to my questions as well.

9 MR. HUTSON: Thank you.

10 THE COURT: Mr. Morris, would you like to respond?

11 MR. MORRIS: Yes, your Honor. Thank you. Your
12 Honor, in response to a few of the things that have been raised by
13 counsel for Mr. Fout, one of the last things he said, which I do take
14 issue with, he said the source of the problem is the Internet. The
15 source of the problem is Steven Fout. The world is full of people
16 that use the Internet and never distribute child pornography.

17 THE COURT: It's like your argument about guns, isn't
18 it?

19 MR. MORRIS: Pardon me, your Honor?

20 THE COURT: Kind of like the argument about guns—

21 MR. MORRIS: Yes, exactly.

22 THE COURT: —guns don't kill people, people kill
23 people?

24 MR. MORRIS: Exactly, your Honor. So I do take issue
25 with that statement. Some of the things that counsel also

1 mentioned, one of the things he had mentioned was, well, these
2 enhancements apply in all the cases and, therefore, the Court
3 should give them less deference because they don't differentiate
4 between different types or different levels of severity of offenses.

5 But the statistics that he cited himself show that almost 30 per
6 cent of the defendants did not receive an enhancement for sadistic
7 or masochistic depictions, 29 per cent of defendants possessed less
8 than 600 images of child pornography, and over 26 per cent of
9 defendants did not possess images portraying other forms of
10 violence.

11 So his argument almost swallows itself, because, while they
12 commonly apply, and outside of the child pornography context,
13 there are sentencing enhancements that apply to almost every
14 defendant, and it is not a cause for ignoring them, and I would
15 respectfully submit that, in a case where one would not apply, that
16 would be a basis to say this one isn't as bad and we should give a
17 less, lesser punishment.

18 THE COURT: Mr. Morris, I don't know the answer to
19 this question, but what's the old quote from Mark Twain, "There
20 are lies, there are damn lies, and there are statistics"?

21 MR. MORRIS: That's true, your Honor.

22 THE COURT: Are the statistics skewed in a situation
23 where the federal government is only bringing the more serious
24 cases; in other words, where there's some discretion about which
25 cases to bring and which cases not to bring?

1 If you have that discretion, I would assume that you're taking
2 the serious cases, and as a result, the cases that you're taking, the
3 serious cases, are going to be subject to these enhancements,
4 greater enhancements, and that's going to drive, again, that will
5 drive the statistics. Am I wrong or—

6 MR. MORRIS: Your Honor—

7 THE COURT: —every case that comes in the door,
8 these child pornography cases?

9 MR. MORRIS: It is, your Honor. We don't prosecute
10 every case that comes in the door, and the law enforcement
11 community does not necessarily pursue every case that comes in
12 through the door.

13 I have a matter that was in my office this week, and we didn't—
14 we basically felt like that it wasn't serious enough to warrant the
15 limited resources of federal prosecution. So your Honor is right,
16 we do pick the worst of the worst.

17 And, unfortunately, there are a lot of these cases out there,
18 and we just can't do them all. And so when a defendant such as Mr.
19 Fout comes in and complains about all these enhancements
20 applying to them, it's just for that reason. We exercised our
21 prosecutorial discretion and chose his case as one of the worst of
22 the worst for prosecution in the federal system.

23 THE COURT: What about his argument, if you could,
24 if you could address his argument, that he would be treated
25 differently within the prison system, that he may be subject to

1 abuse based on his unique characteristics?

2 MR. MORRIS: Well, your Honor, one of the things, in
3 researching for this case, I came across– and I do not have it for the
4 Court, but I can quote, I can quote to you, to the Court, testimony
5 from a case in the Eastern District of New York, in the case United
6 States vs. C.R. in which the director of the– the coordinator of the
7 sex offender management program at the Federal Medical Center in
8 Devens, Massachusetts, was asked about this very thing.

9 The question posed: “What sort of safety measures do B.O.P.
10 institutions take to protect sex offenders from potential inmate-on-
11 inmate violence?

12 “Answer: Well, largely, all inmates who come into bureau
13 custody are informed of the rules and are informed that there is no
14 tolerance for any type of harassment, any type of threats, violence,
15 and so on. And inmates are informed of the procedures that they
16 should follow in the event they feel threatened, harassed, or
17 otherwise uncomfortable with regard to how other inmates interact
18 with them.

19 “And one of the primary means of prevention is open
20 communication between staff and inmates. At Sex Offender
21 Management Protection institutions, sex offender management –”
22 I’m sorry “–sex offender management program institutions,
23 certainly at Devens, I can attest to the fact that every day they do
24 talk to us if they are feeling uncomfortable.

25 “Typically, staff would follow up by determining whether or

1 not there is any degree of threat to that individual. Sometimes it
2 means putting someone in a more secure environment so they can
3 determine whether or not there is a threat. Sometimes it means that,
4 if a threat is verified, that individual might be transferred. They
5 need to separate inmates involved. So there are a number of
6 procedures we have in place.

7 “Question: Are there certain housing units that are designated
8 for inmates who may be more susceptible to inmate-on-inmate
9 violence?

10 “Answer: Each institution has housing units that are
11 designated to increase or to optimize, I guess, supervision for the
12 inmates; however, for instance, we have special housing units.
13 Placement in those environments is not ideal. We want inmates to
14 be able to function in an open compound. So what we do is, if there
15 are allegations, we may potentially be in a position, where we have
16 pending investigations, place inmates in a special housing unit to
17 determine if there is a threat.”

18 So the witness, who’s named as Cheryl Renaud, R-e-n-a-u-d,
19 who is the coordinator of the sex offender treatment program at one
20 of the federal facilities designed to treat sex offenders, has laid out
21 a number of procedures that the Bureau of Prisons utilizes to
22 protect inmates that might be subject to inmate-on-inmate
23 violence.

24 Another thing that I learned in this research, your Honor, and
25 I would proffer to the Court, that these defendants who are in these

1 programs are in a— one of six federal institutions that house— that
2 try to maintain a 40 per cent sex offender population in those
3 facilities. So he would not be alone, he would not be the only
4 person that was in a sex offender management program, and that
5 the Bureau of Prisons strives to protect people like Steven from
6 any sort of inmate-on-inmate violence.

7 THE COURT: The location would be closest to
8 Knoxville would be Butner, North Carolina?

9 MR. MORRIS: I think so, your Honor. I think that's
10 correct.

11 THE COURT: Is that also a medical facility?

12 MR. MORRIS: It is, your Honor. That's my
13 understanding, it is.

14 THE COURT: Do you have any statistics on the number
15 of individuals that are in the federal prison system that are blind,
16 legally blind?

17 MR. MORRIS: I do not, your Honor.

18 THE COURT: Are you aware that there are individuals
19 that are blind?

20 MR. MORRIS: That would make sense, your Honor, yes.

21 THE COURT: It's my understanding. I wanted to see if
22 you had a different understanding. Do you believe that's correct?

23 MR. MORRIS: I believe it is correct, your Honor.

24 And, you know, as the Court pointed out, the Defendant, though
25 legally blind, certainly could see well enough to commit the

1 offenses for which he is here today. Legal blindness, while
2 unfortunate, your Honor, is, I don't feel like, based upon my
3 experience, something that takes him out of the heartland and is
4 something that the Bureau of Prisons would not be equipped to deal
5 with if he were incarcerated, when he is incarcerated for these
6 offenses.

7 Your Honor, in your discussion with counsel for Mr. Fout,
8 your Honor responded to some of his points with many of the
9 points that I made in my response to his request for a downward
10 departure or variance, and unless the Court has other questions of
11 me, your Honor, I would, I would stop. I don't want to belabor the
12 point.

13 I was prepared to address some of the conditions of
14 supervised release, but the Defendant has indicated he has no
15 objection to them. And I would simply close by pointing out, your
16 Honor, that much of the focus of this hearing and, of course, of the
17 Defendant's filing, has been on Steven, and we can't lose focus on
18 the victims in this case and the effects that offenses like the
19 Defendant's have on them.

20 We can't forget that children are raped in the production of
21 these horrific videos and that the continued circulation of those
22 depictions reaps significant additional harm on those defendants—
23 on those, on those victims.

24 One of the other— we get this argument oftentimes, and I'm
25 sure your Honor has heard it: well, he didn't touch anybody or he

1 didn't hurt anybody himself. And one of the things that concerns
2 the United States most about the kind of activity that Mr. Fout was
3 engaged in is, it normalizes this type of behavior in the community
4 of child pornographers, of pedophiles, and creates a further
5 demand for victimization, new videos, new pictures, new rapes of
6 children. And we can't lose sight of that fact, we can't lose sight of
7 the serious nature of the offense that the Defendant is here before
8 today, before the Court today.

9 A couple things that the Court has already touched on, of
10 course, are the Defendant's characteristics, and while the United
11 States would recognize that he has health problems and has had
12 some terrible events in his own history, there are things that swing
13 the gate the other way significantly, your Honor.

14 One of them is that, who better than Steven Fout could know
15 the effects, the devastating effects, of being molested as a child,
16 and he should have known better. Also, your Honor, as the Court
17 noted, the chats in which the Defendant has engaged are reflective
18 of his character.

19 Not only was he seeking child pornography; he was actually
20 coaching other individuals who he believed to be either pedophiles
21 or children themselves on how to commit rapes of children,
22 including advising them to drug individuals so they could take
23 advantage of them. Those kinds of things, your Honor, in my mind,
24 swing the gate the other way.

25 While there are characteristics that weigh in the favor of the

1 Defendant, there are certainly a number of 3553(a) factors that
2 weigh heavily against him, and I ask that the Court consider those
3 in making its decision today.

4 MR. HUTSON: Your Honor, if I may briefly respond?

5 THE COURT: Yes, sir. Certainly.

6 MR. HUTSON: Thank you very much. Your Honor, of
7 course, Steven is here because Steven committed an offense. The
8 computer issue is related to the statute. The computer was the
9 mechanism in which these crimes occurred.

10 And many courts in the Sixth Circuit and beyond have
11 determined that, when a court gives a sentence, whether it be
12 related to special conditions or the sentence itself, that the
13 sentence has to be narrowly tailored to fit the individual defendant.

14 With that being said, your Honor, we do believe that strict
15 prohibition on the computer and the Internet would provide safety
16 to the community, and it would promote respect for the law and it
17 would prevent Steven from re-offending.

18 I would also say– and I have a great deal of respect for Mr.
19 Morris. He’s one of the finest prosecutors in their office. But I do
20 respectfully disagree with his argument related to the person
21 running the sex offender facility at the Bureau of Prisons facility.

22 I disagree, because I would find it shocking that someone
23 who is employed by a federal facility would confess that inmates
24 have been abused, which could subject that facility to criminal
25 and/or civil liability. So I’m not sure that that is the most reliable

1 source of whether inmates are being abused or not.

2 And, lastly, your Honor, in terms of Mr. Morris' argument
3 about this could normalize this type of behavior, it's not Steven
4 that has characterized Internet conduct as passive versus active
5 conduct you see in an enticement case. That's courts. Courts'
6 decisions have classified Internet conduct as a passive crime in
7 relation to other types of sex offenses.

8 And so the rationale behind that is, is, again, back to the
9 sentencing statute, that it is the individualized defendant that
10 receives a sentence in a case, not a group of criminal defendants
11 and a type of conduct that they might commit that is similar to one
12 another.

13 Your Honor, and just for purposes of the record, we again
14 object to the chat discussions as being a basis for a decision with
15 the Court today. Steven is here for a child pornography sentence
16 today, and we certainly do not stipulate to any, any of those actions
17 in relation to any other allegations in the pre-sentence report.
18 Steven does again object to those allegations as well. Thank you.

19 THE COURT: I'm going to address the departure issue
20 initially, because I would typically wait until after I've heard from
21 everyone in allocution, including the Defendant, before addressing
22 issues of variance. Because it really does get to the point of all the
23 factors in 3553.

24 Now, some of these, of course, have been argued in support of
25 a variance as well, but initially I do need to address the issue of a

1 departure under the guidelines, because that affects the guideline
2 calculation.

3 And the Defendant has raised several arguments in support of
4 a downward departure. We began the discussion today by my
5 referencing Section 5K2.0, which indicates that the Court has
6 limited discretion in terms of departures. Departures that can be
7 considered are those that are outlined in 5K2.0. Some are
8 excluded— some are incorporated 5H factors and others are
9 excluded.

10 But the section basically provides that, unless it's stated in
11 5K, then it shouldn't be the basis for a departure. And I have
12 referenced 5K2.22, so let me turn to that. There's also been an
13 argument of this case being outside the heartland of cases, which
14 would be 5K2.0.

15 But we'll get to 5K2.22 first, and that section provides, in
16 essence, that, "Age may be a reason to depart downward only if and
17 to the extent permitted by 5H1.1." And then Subsection 2—
18 Subparagraph (2) provides, "An extraordinary physical impairment
19 may be a reason to depart downward only if and to the extent
20 permitted by Section 5H1.4." So we have to turn to those two
21 sections.

22 5H1.1 indicates that, "Age, including youth, may be relevant
23 in determining whether a departure is warranted if considerations
24 based on age, individually or in combination with other offender
25 characteristics, are present to an unusual degree and distinguish

1 the case from the typical cases covered by the guidelines.”

2 Now, initially, if I look at age without these other factors, that
3 is not a reason to depart in a case such as this. Unfortunately, too
4 many of these cases involve very young defendants. My experience
5 has been that I see defendants that are college-age male or they are
6 over-50-aged male. That’s just the characteristics of those
7 individuals.

8 So, and like I say, I’ve sentenced way too many 20- to 25-
9 year-olds for possession and distribution of child pornography. So
10 age in itself, in my experience, would not be a reason to depart,
11 under 5K– I’m sorry– 5H1.1.

12 And even if I look outside my own experience, I look at other
13 individuals that are often charged and convicted under the statute
14 that we’re talking about here today, it’s not unusual to see young
15 defendants of the age of Mr. Fout. However, the Court can also
16 consider age in combination with other factors.

17 When I look at the next section, 5H1.4, that section provides:
18 “Physical condition or appearance, including physique, may be
19 relevant in determining whether a departure is warranted, if the
20 condition or appearance individually or in combination with other
21 offender characteristics is present to an unusual degree and
22 distinguishes the case from the typical cases covered by the
23 guidelines. An extraordinary physical impairment may be a reason
24 to depart; for example, in cases of a seriously infirm defendant,
25 home detention may be as effective as, and less costly than,

1 imprisonment.”

2 The argument that’s been made here is that the combination of
3 the Defendant’s physical characteristics, including his
4 impairments, would be a reason for the Court to consider a
5 departure. Again, in my experience, it’s not unusual to have a
6 lower functioning individual who appears before the Court for
7 sentencing. That tends to be the rule rather than the exception.

8 However, it is unusual for the Court to have an individual
9 that’s legally blind that has been convicted of these particular
10 offenses. But, again, this defendant was able to function and was
11 able to commit the offenses under the same conditions that he
12 presents today. But the question becomes, would those
13 characteristics be a reason to depart, are they so extraordinary that
14 they would be a reason to depart?

15 The Bureau of Prisons certainly does have facilities that can
16 provide medical treatment for the Defendant’s conditions, also not
17 only the conditions that have been mentioned, specifically, issue
18 being legally blind, but the other conditions as well. He can be
19 treated in a medical facility, and there are those facilities that can
20 address those problems that he has, that can provide him with
21 necessary evaluation as well as treatment.

22 But the argument is that, based upon these specific
23 characteristics, the Defendant would be more prone to be injured
24 either by accident or intentionally injured. To base a decision on
25 that argument would be speculation by the Court, pure speculation.

1 And while the Court certainly has sympathy for individuals,
2 the Court should not base its decision on sympathy and use this as
3 an excuse to do so. So, in this particular case, I do not believe that
4 the characteristics would be of the nature that would give rise or
5 should give rise to a departure under 5H1.4. Likewise, I do not
6 believe that the conditions are sufficient that would fall outside the
7 heartland of cases.

8 When the Court looks at, again, looks at the typical offender
9 in these cases, it's not always the strong, the six-foot-two or six-
10 foot-three, 250-pound, defendant that presents to the Court, but
11 it's individuals that sometimes are of a slighter build and may be
12 more prone perhaps to be abused.

13 But, quite frankly, the Bureau of Prisons has a variety of
14 individuals that are much smaller and that are much more frail than
15 this defendant. Unfortunately, I've had to sentence quite a few that
16 have very serious medical conditions, and, again, the Bureau of
17 Prisons is able to address those individuals.

18 So while the Court certainly considers these arguments
19 individually, as well as in combination, under those sections that
20 have been referenced, 5K2.22, 5K1.— I'm sorry— 5H1.1, 5H1.4,
21 5K2.0, which is the section that allows the Court to consider
22 matters that are outside the heartland, it would not appear to me,
23 based upon the information that has been presented, that a
24 departure would be appropriate.

25 Now, once again, the Court is making the determination under

1 the guidelines, and this same information is relevant as an issue of
2 a variance, when the Court considers these issues under 3553. But
3 in terms of a departure, those would not be reasons to depart.

4 Likewise, there has been an argument that the Court should
5 consider an omnibus departure based upon the assertion that the
6 guidelines are just too harsh. As you can tell from my questions, in
7 this court, in the federal system, individuals are often presented
8 with a number of very aggravating circumstances, and that would
9 appear to be the situation here.

10 And just because the Court can depart doesn't mean that the
11 Court always should depart. While the Court has the ability to do
12 so, it should do so when appropriate, and, in my view, a departure
13 would not be appropriate under the circumstances that have been
14 presented and the reasons that have been argued for a departure
15 under the motion and the memorandum that has been filed by the
16 Defendant. So the motion for departure will be overruled at this
17 time.

18 I'll also note for the record that there has been a late objection
19 that has been made to the Court considering the Internet chat, and
20 I'm going to exclude that from my consideration in determining the
21 penalty to be imposed in the case. My point earlier was that, if this
22 was the Defendant engaging in this chat, that his functioning level
23 was higher than the functioning level that was being represented,
24 that he was very low-functioning. It appears to the Court that he is
25 able to function at a higher level than has been represented to the

1 Court.

2 So the motion for downward departure will be overruled for
3 the reasons stated, and we'll proceed at this time with allocution.
4 I'll certainly consider all the arguments that have been made
5 previously, but I will give the parties an opportunity for full
6 allocution, and that would include giving the Defendant the
7 opportunity to make a statement to the Court.

8 So, Mr. Hutson, at this time, if you have additional
9 information, I'll certainly consider it, and I'll also consider any
10 statement that Mr. Fout would like to make.

11 MR. HUTSON: I believe Mr. Fout would like to make a
12 brief statement. Would the Court prefer him to stay seated?

13 THE COURT: He can remain at counsel table, if the
14 reporter is able to hear him from there. Also, before he makes a
15 statement to the Court, let me also remind Mr. Morris, if you have
16 any victim impact statements that you would like to present to the
17 Court, you can certainly do that during allocution here in just a
18 moment.

19 Thank you, and you may proceed.

20 MR. FOUT: I'd like to say I'm very sorry. This will
21 never happen again.

22 THE COURT: Anything else, Mr. Fout?

23 MR. FOUT: No, sir.

24 THE COURT: All right. Thank you. Mr. Hutson, any
25 other statements you would like to offer during allocution?

1 MR. HUTSON: No, your Honor. Thank you.

2 THE COURT: All right. I have reviewed all of the
3 materials attached, of course, to the memorandum that was filed in
4 your case. I know that there were quite a few matters that weren't
5 referenced, but I certainly reviewed all of those matters as well.
6 Thank you. Mr. Morris?

7 MR. MORRIS: Your Honor, it was my understanding, it
8 was my understanding, that the victim impact statements in this
9 case would be made available to the Court. I, unfortunately, don't
10 have hard copies of them to submit to the Court at this time, I don't
11 believe.

12 I can go through my file and see if I have them, but they have
13 been received in this case. They generally detail certain of the
14 victims that were identified from the child pornography that the
15 Defendant was found to be in possession of, and they generally do
16 report, as the Court is aware in these cases, the ongoing
17 devastating effects that not only the initial abuse or predation on
18 them caused, but the repeated effects that these children, some of
19 whom are now adults, continue to suffer as a result of their images
20 being circulated and looked at over and over again.

21 Your Honor, again, I apologize for not having the hard copies
22 here, but as I understand it, the Court has— those have been made
23 available to your Honor.

24 THE COURT: I believe I am required, during
25 allocution, to ask if you have any statements, and actually any

1 victim is allowed to make a statement as well, not only in written
2 form, but to present themselves to the Court.

3 MR. MORRIS: Yes, your Honor.

4 THE COURT: So I'm fulfilling that responsibility.

5 MR. MORRIS: There are no victims, your Honor, that
6 have come forward and said that they would like to be heard at the
7 hearing today.

8 THE COURT: All right. Thank you. Well, again, the
9 Court not only considers the information previously provided, but
10 the Court will certainly consider the Defendant's statement, his
11 statement that this type of an offense will not occur in the future.

12 The Court considers not only the guidelines, but also relevant
13 factors of Title 18, Section 3553. Many times, while information
14 that is presented as a departure would not be appropriate to change
15 the guideline calculation, it certainly can affect the Court in terms
16 of a variance. And if it doesn't support a variance either above or
17 below the guidelines, it is helpful to the Court in determining
18 where within a guideline range a particular individual should be
19 sentenced.

20 Again, the guidelines are not binding. There is a mandatory
21 minimum as to one of the counts in this case of 60 months, but the
22 guideline range in this particular case is higher than that. I'll
23 review the guideline calculations here in just a moment.

24 But before I do review the guideline calculations, I do want to
25 mention that the factors that the Court would consider under 3553

1 would include the nature and circumstances of the offense, as well
2 as the history and the characteristics of the Defendant. Many of
3 those characteristics have been addressed here today.

4 The Court will also consider the need for the sentence to
5 reflect the seriousness of the offense, the need to promote respect
6 for the law and provide a just punishment for the offense. The
7 Court will also consider the issue of deterrence. It's important in
8 every case, it's certainly important in this case, as is the issue of
9 protection of the public.

10 The Court also considers the other relevant factors of 3553,
11 including the need to avoid unwarranted sentencing disparities
12 among defendants that are similarly situated who have been found
13 guilty of similar conduct.

14 But as the attorneys are certainly aware, it's difficult to find
15 defendants that are similarly situated because, as Mr. Hutson has
16 indicated, sentencing is unique, and the Court must consider the
17 individual factors that a defendant has in imposing a sentence.

18 In this particular case, there are no objections to the report.
19 We've discussed the issues of departures. There's been no
20 objections to the report, except as I've indicated with regard to the
21 Internet chat. Those are actually attached, I believe, to the United
22 States' response to the Defendant's motion.

23 But I will adopt the findings that are contained in the pre-
24 sentence report, as well as the following guideline calculations.
25 They do appear in the pre-sentence report, beginning at Paragraph

1 17, which indicates that the 2013 edition of the guideline manual
2 has been used.

3 In this particular case, the base offense level is a Level 22, but
4 as we've been discussing, there are a number of enhancements, and
5 I do need to mention the reason for these enhancements.

6 There is a two-level enhancement because the material that
7 was possessed involved prepubescent minors or a minor under the
8 age of 12, and that results in a two-level increase. There's also a
9 two-level increase under Paragraph 21. The paragraph indicates
10 that the agent in the case was able to download 105 images of child
11 pornography from the Defendant's computer using a file-sharing
12 program.

13 And there's a four-level increase because the material that
14 was portrayed— or that was possessed portrayed sadistic and
15 masochistic conduct, depictions of violence, involving very young
16 children.

17 There's also the two-level increase for use of the computer
18 and a five-level increase based upon the number of images. In this
19 case, more than 600 images were involved. And that results in an
20 adjusted offense level of Level 37.

21 There's a three-level reduction shown for acceptance of
22 responsibility. Before the Court can award the third level of
23 acceptance credit, it requires a motion from the United States.

24 MR. MORRIS: Your Honor, we would so move at this
25 time.

1 THE COURT: And I'll sustain that motion. That has the
2 effect of reducing the total offense level to a Level 34. Now, in this
3 particular case, Mr. Fouts [sic] does not have any criminal history,
4 and that's not unusual in cases such as this. It's not unusual to have
5 a person who appears for sentencing that does not have any prior
6 convictions, and so he is placed in criminal history category of
7 one.

8 His guideline range, based upon those calculations, would be
9 a range of 151 to 188 months, and that range is set forth in
10 Paragraph 58. The fine range in the case is a range of 17,500 to
11 \$175,000. Now, in this particular matter, the parties have agreed
12 upon an amount of restitution. Based upon that, I will advise the
13 parties I'm not inclined to impose a fine in this particular case. But
14 that is the fine range.

15 And I'll also note for the record that the probation office has
16 advised the parties of the standard conditions of supervised release
17 through the pre-sentence report, and the parties are in agreement
18 and have not objected to any of those conditions to be imposed on
19 supervision.

20 I will advise the parties that I will make a minor change in one
21 of the revisions based upon some case law from the Sixth Circuit,
22 the Arnold case, that indicates that the Court should perhaps
23 consider some limiting language on one of those conditions, and
24 I'll address that here in just a moment.

25 But I will also note for the record that, in considering the

1 issues of supervised release, that I have reviewed quite a few cases
2 from the Sixth Circuit. We've referenced some of those today, and
3 I'll be addressing, although there's no objection, I'll be addressing
4 some of those conditions in a little more detail in just a moment.

5 Again, those are the guideline calculations that the Court has
6 adopted. So, in addition to the guidelines, in addition to the factors
7 of 3553, the Court will also consider statements that are made in
8 allocution.

9 In this particular case, while I have certainly considered the
10 arguments that do support a variance, I am convinced by the
11 arguments that have been made by the United States in the case that
12 a variance would not be appropriate under the facts that are
13 presented. And there are several points from their sentencing
14 memorandum that I specifically agree with, and I do want to note
15 for the record, as a basis for my ruling.

16 First, as the Government points out, that while the Defendant
17 does have visual impairment, he's legally blind, it was not so
18 severe that would prevent him from or that did prevent him from
19 distributing child pornography through the Internet and perhaps
20 participating in Internet chats.

21 Again, there's been an objection to the Internet chats, but,
22 again, there's also no objection to the issue of distribution and that
23 he was able to do so, in light of his visual impairment.

24 Second, the child pornography images are extremely serious,
25 and they do result in perpetual harm to the victims. That's certainly

1 clear. And this type of an offense does– it tends to validate, in the
2 minds of the offender, that the sexual exploitation of children is
3 normal as opposed to the product of what can only be described as
4 sick and twisted.

5 It's also true that as this normalization process takes place
6 with various offenders, that sexual exploitation of children only
7 increases, and the children are becoming younger in these cases
8 that we see.

9 Next, it is hard to imagine a more serious class of
10 pornography of children than what's been described in the pre-
11 sentence report. It's depravity that just shocks the conscience of
12 the Court.

13 Now, there has been a challenge to the guidelines. I've
14 discussed that earlier, but I will again refer the parties to my belief
15 that these issues have been addressed by the Sixth Circuit in recent
16 decisions by Judge Kethledge and the cases that have been cited.

17 Also, it's clear to the Court that Mr. Fout has demonstrated an
18 interest in engaging in sexual activities with very small children,
19 and that certainly does cause the Court some concern. But some of
20 that concern can be alleviated through conditions of supervised
21 release that will be imposed and conditions that have been adopted
22 in this district in such cases.

23 There has been some discussion about whether home
24 detention would be an appropriate remedy here, but as indicated in
25 my questions earlier, at the time these offenses occurred, the

1 family was not able to either detect the offenses or prevent them
2 from taking place.

3 And while the Defendant has expressed some remorse in this
4 case and he's indicated that this action will not happen again, he's
5 indicated that he is certainly sorry for his actions, I believe that
6 he's failed to recognize the pain and the harm, the damage, that's
7 been caused by his actions in possessing and distributing child
8 pornography.

9 I have referenced an article earlier that I believe really
10 specifically addresses this issue of who the real victim is and the
11 ongoing nature of the harm that it causes when individuals
12 download child pornography.

13 So, considering all those arguments and that information, the
14 Court believes that, under the circumstances, that the aggravating
15 factors would certainly offset any mitigating factors in terms of a
16 departure— I'm sorry— in terms of a variance from the guidelines.

17 However, I do believe that the arguments that have been made
18 for mitigation would support a sentence at the bottom of the
19 guideline range. I don't believe it's necessary for the Court to go
20 above that to meet all of the statutory factors, including the issues
21 of deterrence and protection of the public.

22 I believe that such a sentence would certainly reflect the
23 seriousness of the offense, I believe it would also promote respect
24 for the law, and it would be a just punishment, in light of the
25 egregious nature of the pornography that I've mentioned several

1 times now.

2 MR. MORRIS: Your Honor, I apologize. It's highly
3 unusual for me to interrupt the Court at this point in a sentencing
4 hearing, but I would like to have some clarification here on what's
5 going on with regard to the previously objected to Internet chat
6 issue.

7 The PSR, in Paragraph 12, discusses how the Defendant was
8 investigated for participating in chat rooms on the Internet. He
9 allegedly was telling other individuals they could molest a child,
10 for instance, by putting Visine in the child's drink so that the child
11 would fall asleep and could then be molested.

12 Defendant also talked about following the child into the
13 bathroom at a restaurant. Defendant Fout told the investigating FBI
14 agent that it was— his fantasy was to have sex with a newborn.

15 What I'm not clear about is, is the Defendant objecting to that
16 conduct being attributed to him, because if it is, your Honor, I'm
17 prepared to call an FBI agent to explain why that should be
18 attributed to him.

19 THE COURT: Well, we'll certainly attempt to get that
20 clarified. It was my understanding that there was no objection to
21 the pre-sentence report, that further information that supports your
22 position was attached to your sentencing memorandum.

23 The Defendant now objects to— he objected to the conduct
24 being attributed to him. I had addressed the issue earlier, in
25 response to what I perceived to be his argument that he was low-

1 functioning. Because it would appear to me that if those
2 communications were, in fact, his communications, that he's not
3 low-functioning. He's able to communicate at a much higher level
4 than the argument that was being made.

5 But I'll certainly allow Mr. Hutson to state his objection, if
6 you would like to object, and if we do need to take— if you would
7 like to present any further proof on that, I'll certainly allow you to
8 do that. I don't intend to go back over the matters that I've covered
9 to this point in the proceeding, but we'll see where we go after I've
10 heard from Mr. Hutson.

11 Mr. Hutson, what is the position of the Defendant?

12 MR. HUTSON: Well, your Honor, the pre-sentence
13 report properly classifies these occasions as allegations. We are
14 aware of the allegations. We were made aware of the allegations
15 early on in the case.

16 From our perspective, there is nothing to object to. It would
17 be like a defendant who had a pending arrest, that is a fact, that the
18 defendant has a pending arrest. It's an allegation that the defendant
19 has created— or committed a bank robbery. And so, from my
20 perspective, I did consult probation about this issue at some point
21 in time, that I did not have an objection to the report as long as it
22 was presented as an allegation.

23 That's all we have to this point. I'm not necessarily
24 contesting the issues that Mr. Morris is speaking about today. But
25 from my reading of the report, it says they're allegations, and

1 there's nothing to object to, if that's how the information is
2 presented.

3 THE COURT: I will advise the parties that I'm not sure
4 that presenting proof would alter my analysis in terms of the
5 sentence. And because the parties have not indicated any objection
6 to conditions of supervised release— and that really is what this
7 goes to, is an issue of providing protection to the public going
8 forward— because they haven't objected to that, you haven't
9 objected to it, either side, then it probably would not affect my
10 determination as to conditions of supervised release.

11 But if you would like to present evidence, you're certainly
12 allowed to do that. I'll let you develop the record if you feel it's
13 necessary.

14 MR. MORRIS: Well, your Honor, what I would do at
15 this time is proffer to the Court that those chats were attributed to
16 the Defendant, because the undercover investigation looked at the
17 IP address and they issued subpoenas to those IP address holders,
18 and those came back to Defendant's residence.

19 I would proffer that to the Court. I don't know if Mr. Hutson
20 has an objection to that, but that's my proffer to the Court to
21 support why those allegations are in the pre-sentence report.

22 THE COURT: All right. Mr. Hutson, do you
23 acknowledge that that would be the appropriate IP address?

24 MR. HUTSON: Your Honor, as I mentioned earlier
25 during argument, I'm not prepared to stipulate to any criminal

1 conduct outside of what we're here for today. I can tell you, it is
2 part of the Government's exhibits and may be a different time
3 frame, but it is also clear that there were other individuals using
4 wireless Internet around the residence at some point in time.

5 So I think it might be inappropriate for me to stipulate to
6 information that could corroborate another criminal offense
7 against my client, so I would have to object to it in that regard.

8 THE COURT: All right. That's fine. If you would like
9 to present the witness to confirm that information, I'll certainly
10 allow you to do that.

11 MR. MORRIS: Your Honor, in that case, the United
12 States would call Special Agent Richard Lara.

13 THE COURT: Thank you. Again, I'll note for the record
14 that this would be an issue that would not affect the guideline
15 calculations, so it necessarily would not require a finding by the
16 Court. But I'll certainly consider the information for whatever it's
17 worth.

18 COURTROOM DEPUTY: Do you solemnly swear or
19 affirm that the testimony you will give in the matter before the
20 Court today will be the truth, the whole truth, and nothing but the
21 truth, so help you God; if so, please say, "I do"?

22 THE WITNESS: I do.

23 THE COURT: Thank you, and you can proceed.

24 **DIRECT EXAMINATION**

25 by Mr. Morris:

1 Q. Special Agent Lara, you and I met before the sentencing
2 hearing today, correct?

3 A. Correct.

4 Q. And I showed you—

5 (Court reporter requested witness name.)

6 THE WITNESS: Oh, Richard, R-i-c-h-a-r-d; last name,
7 Lara, L-a-r-a.

8 Q. And during our meeting, I showed you three FBI reports of
9 investigation which contained excerpts of chats that have been part
10 of the case file in this case, correct?

11 A. Correct.

12 Q. And based upon your familiarity with the investigation, were
13 those— why should those discussions that were contained in the
14 United States' attachments to the Defendant's motion for a
15 downward departure, why are those attributable to the Defendant?

16 A. They, during those discussions, those undercover sessions, a
17 protocol analyzer was used that was able to, during those
18 downloads, able to analyze the connection. And since those files
19 were downloaded directly from that individual, we were able to
20 trace an IP address that was used to bring those— that was for that
21 connection.

22 Through subpoenas for those IP addresses, we were able to
23 the get further information as to who the subscriber was relating to
24 those IP addresses on that date and at that time.

25 Q. And what were, based on those subpoenas, what— to where

1 were those IP addresses attributable?

2 A. According to Charter V– Internet service was with Charter,
3 and the address was 157 Limestone Drive, Sweetwater, Tennessee.

4 Q. And based upon your familiarity with this case, is that where
5 the Defendant was residing at the time of these chats?

6 A. Yes, it is.

7 MR. MORRIS: Those are all the questions I have for
8 Special Agent Lara, your Honor.

9 THE COURT: Thank you. Any cross-examination?

10 MR. HUTSON: Very briefly, your Honor.

11 **CROSS-EXAMINATION**

12 by Mr. Hutson:

13 Q. Are you also familiar with reports in this case that indicate
14 that perhaps at least one other individual was using the WIFI
15 connection from this location at some point in time?

16 A. Yes. I have mentioned in one of the reports that the wireless
17 network might have been left open, and there was a neighbor at one
18 point that possibly parked in front of the house and used the
19 wireless system.

20 Q. So while the Internet protocol analyzer may be a good source
21 of information, there's no real way for you to tell the Court today
22 that Steven Fout, or whoever was at the residence, was the actual
23 person in front of the computer; is that an accurate statement?

24 A. If you take into account the undercover sessions of what was
25 relayed and some of the facts or some of the things that the other

1 person mentioned, in my opinion, I would say they were
2 attributable to Steven.

3 Q. But, given your experience, this IP address is associated with
4 an address, correct?

5 A. Correct.

6 Q. It's not associated with a person?

7 A. You are correct.

8 Q. And there is no two-way camera system on the computer for
9 you to be able to tell the Court today, 100 per cent, this is Steven
10 Fout on the other end?

11 A. Correct.

12 MR. HUTSON: Thank you. No further questions.

13 THE COURT: Special Agent, did you conduct any type
14 of investigation to rule out this other person—

15 THE WITNESS: No, I did not, sir.

16 THE COURT: —in your case? Did you feel like there
17 was any reason to do so?

18 THE WITNESS: No, sir.

19 THE COURT: Thank you. Anything else?

20 MR. MORRIS: No, your Honor.

21 THE COURT: Thank you. You can step down.

22 (Witness excused.)

23 THE COURT: All right. Thank you. Any further
24 information you would like to present?

25 MR. MORRIS: No, your Honor. I apologize for sort of

1 taking things out of order, but I wanted to cover that with the
2 Court.

3 THE COURT: All right. Thank you. Let me just note for
4 the record that the additional information provided, the Court
5 analyzes information that's offered during a sentencing hearing
6 under a different standard than the Rules of Evidence would
7 provide; that as long as the information has sufficient indicia of
8 reliability, the Court can consider the information.

9 In this particular case, I do find that the information
10 presented would have that level of reliability, but the Court only
11 considers the information for the reason that I've stated earlier,
12 and that is whether the Defendant had the level of sophistication
13 has been described or whether he was lower functioning than
14 indicated.

15 Throughout the course of this proceeding it's been my
16 determination that, while he may not be a very high-level– high-
17 functioning individual, he's not at the level that has been described
18 or has been argued earlier and certainly would be able to engage in
19 the type of chat that has been referenced.

20 Again, the issue, however, goes to the issue of protection of
21 the public. It does not alter my analysis in terms of the length of
22 incarceration that would be imposed. Again, the parties are in
23 agreement in terms of conditions of supervised release, and so,
24 again, it would not affect the ultimate sentence in the case. But
25 that's the manner in which the information is being considered by

1 the Court.

2 Now, I was discussing the various factors that the Court
3 considers. I've gone through the 3553 factors several times at this
4 point. I was mentioning the fact that the Court considers the issue
5 of unwarranted sentencing disparities and the need to consider
6 each person individually.

7 And, again, as has been argued by Mr. Hutson, the Court's
8 duty when considering all these issues, is to impose a sentence that
9 would be sufficient, but not greater than necessary, to comply with
10 the purposes of Title 18, Section 3553(a)(2).

11 So, with all that background, all of that information, when
12 I've considered all the factors that I have just listed, it's my
13 determination that, in this particular case, that a sentence at the
14 bottom of the guidelines would be the appropriate sentence in this
15 particular case in terms of a term of incarceration.

16 Now, there's also a very important issue, and that is, in
17 addition to the term of incarceration, what's an appropriate period
18 of supervised release.

19 In this matter, when the Court takes into account the term that
20 the Defendant will likely serve, his age at the time that he would be
21 released, and how much supervision would be the minimum period
22 at that time, it's my determination that a term of supervised release
23 to provide sufficient protection to the public would be 30 years. So
24 that would be the term of supervision that will be imposed in the
25 case, and, again, that would be the minimum term that I believe

1 would be appropriate.

2 Also, when the Court considers conditions of supervised
3 release, I'll refer the parties back to United States vs. Shultz. I
4 believe that was the case I mentioned earlier by Judge Sutton, when
5 he talks about conditions of supervision.

6 And, of course, there are three primary reasons for imposing
7 these conditions, and they do include to deter future criminal
8 activity, to protect the public, and to provide proper rehabilitation
9 for the Defendant.

10 Judge Sutton also notes in that opinion that the conditions of
11 supervised release must be reasonably related to the various
12 sentencing factors, and I've already discussed those factors. But
13 they do include the nature of the offense and the characteristics of
14 the Defendant.

15 Judge Sutton also makes a very important point in that case,
16 and that is that sex offenders don't get a free pass at child
17 molestation before prophylactic rules of supervision become
18 appropriate. And, in my opinion, the conditions that have been
19 adopted in this district for these offenses are all important and they
20 all do provide sufficient protection of the public if they are
21 followed.

22 There is one modification to Local Rule— let's see—
23 83.10(b)(5) that references possessing printed photographs,
24 paintings, recorded materials or electronically produced materials.
25 There's a prohibition on that for the use of deviant sexual arousal,

1 and that will be modified to reflect arousal of sexual interest in
2 children.

3 I believe that comes from the Arnold case, if I'm not
4 mistaken. So there will be that modification. I had mentioned that
5 earlier. I do think that that would be an appropriate modification.

6 Also, before I fully announce the sentence, with regard to
7 another condition of supervised release, and that is Local Rule
8 83.10(b)(11), that relates to the use of a computer, in this case, I
9 believe it's very important that the Defendant not have access to a
10 computer with access to the Internet.

11 While he may be able to use a computer at some point, he's
12 not being precluded from using a computer, he will not be allowed
13 the Internet access in any means, in any manner. That's the— that
14 led to the problems in this particular case. And in order to provide
15 sufficient protection to the public and also to prevent further
16 offenses by the Defendant, I do believe that that restriction is
17 absolutely necessary.

18 Now, having given you my reasons for the sentence, I will
19 announce it at this time. And, again, I've considered the nature and
20 the circumstances of the offense, as well as the history and
21 characteristics of the Defendant, the Advisory Guideline Range, as
22 well as the other factors that are listed in 3553(a).

23 It will be the sentence of the Court, pursuant to the
24 Sentencing Reform Act of 1984, as modified by the decisions in
25 Booker and FanFan, it will be the judgment of the Court, as to

1 Counts One and Two of the superseding indictment, that the
2 Defendant, Steven Marshall Fout, will be committed to the custody
3 of the Bureau of Prisons for 151 months.

4 Now, those will be served concurrently, so it will be a term of
5 151 months as to each of Counts One and Two, again, to be served
6 concurrently. And it's the determination of the Court that such a
7 sentence would provide adequate deterrence and also provide just
8 punishment for the offense in this particular case.

9 The Court will also recommend that Mr. Fouts [sic]
10 participate in sex offender treatment while incarcerated at the
11 Bureau of Prisons, but I'm also going to recommend, as a primary
12 recommendation, that he receive any and all necessary medical
13 treatment during the period of incarceration based upon the
14 arguments that have been made earlier.

15 So my first recommendation will be medical care and
16 treatment, proper assessment and all necessary treatment;
17 secondarily, will be participation in the sex offender treatment
18 program.

19 He will be required to make restitution in the amount of
20 \$2,500 to the victims that are identified in the pre-sentence report
21 and also that are referenced— I believe the amount was referenced
22 in the parties' plea agreement, and that will be ordered to be paid
23 immediately.

24 Any payment that's not a payment in full will be divided
25 proportionately among the individuals identified. And the

1 Government may enforce the full amount of restitution ordered at
2 any time pursuant to Title 18 Sections 3612 and 3613 and 3664(n).

3 The United States Bureau of Prisons, the United States
4 Probation Office and the United States Attorney's Office may and
5 shall monitor the payment of restitution and reassess and report to
6 the Court any material change in the Defendant's ability to pay that
7 amount.

8 He will be required to make restitution payments from any
9 wages that he earns in prison in accordance with the Bureau of
10 Prisons Inmate Financial Responsibility Program. Any portion of
11 the restitution that's not paid in full at the time of release shall
12 become a condition of supervision.

13 However, I do believe that Mr. Fouts [sic] does not have the
14 ability to pay interest on the restitution ordered, and, therefore, it
15 will be waived in the case.

16 Now, as I've explained earlier, upon release, Mr. Fout will be
17 placed on supervised release for a term of 30 years as to each of
18 Counts One and Two, to be served concurrently.

19 And within 72 hours of release from the custody of the Bureau
20 of Prisons he shall report in person to the probation office in the
21 district in which he is released. Again, the Court imposes this term
22 as the minimum term that is necessary to provide sufficient
23 protection of the public.

24 While on supervised release, the Defendant shall not commit
25 another federal, state, or local crime, shall comply with the

1 standard conditions that have been adopted by this court in Local
2 Rule 83.10, and he may not possess, of course, a controlled
3 substance illegally.

4 He may not possess a firearm, destructive device, or other
5 dangerous weapon, and must cooperate in the collection of DNA as
6 directed by the probation office. And he will be required to comply
7 with the following special conditions.

8 First, he will be required to participate in a program of sex
9 offender mental health treatment at his own expense, as approved
10 by the probation office, until such time as he's released from the
11 program by the probation officer.

12 He must comply with the policies and procedures of the
13 treatment program, and he shall waive all rights to confidentiality
14 regarding sex offender mental health treatment in order to allow
15 release of information to the United States Probation Office and to
16 authorize open communication between the probation office and
17 the treatment providers, and that is pursuant to Local Rule
18 83.10(b)(1).

19 Next, he may have no direct or third-party contact with any
20 victims in the case by any means available to him, and that's in
21 accordance with Local Rule 83.10, Subsection (b)(2).

22 He may not associate or be alone with children under the age
23 of 18, nor shall he be at any residence where children under 18 are
24 residing without the prior written approval of the probation office.
25 In addition, he may not visit, frequent, or remain at any places

1 where children under the age of 18 normally congregate. That
2 would include public parks, playgrounds, or any businesses that
3 cater to or target children customers.

4 And the Court imposes this condition considering the
5 authority from the Sixth Circuit outlined in United States vs.
6 Arnold that I have mentioned earlier. I do believe that that is a
7 necessary condition, in light of the specific facts of this particular
8 case involving very young children.

9 And for the same reason he may not associate with anyone
10 under any circumstances that he knows to be a sex offender,
11 someone who engages in sexual activity with children under the
12 age of 18, or someone who condones or supports the sexual abuse
13 or exploitation of children under the age of 18, and that would
14 include entities or organizations or groups such as NAMBLA,
15 BoyChat or the BoyLover message board, except while
16 participating in sex offender mental health treatment as approved
17 by the probation office. And that is imposed in accordance with
18 Local Rule 83.10(b)(4).

19 As indicated earlier, he may not possess any printed
20 photographs, paintings, recorded materials or electrically
21 produced material that he may use for the purpose of deviant sexual
22 arousal, but that will be modified to include arousal of sexual
23 interest in children.

24 And, likewise, he may not visit or frequent or remain at
25 anyplace where such material is available to him for the purpose of

1 arousal of sexual interest in children. And that would be modified
2 Local Rule 83.10(b)(5).

3 Next, he shall notify the probation office of any location
4 where he receives mail. He shall not obtain a new mailing address,
5 post office box or use the facility of any business for delivery and
6 receipt of mail or any other correspondence without the approval of
7 the probation office.

8 The Court imposes this condition to, again, to avoid any
9 future violations by the Defendant in accordance with Local Rule
10 83.10(b)(6). And he will be required to submit to a psychosexual
11 assessment at his own expense, as directed by the probation office,
12 and that will be in accordance with Local Rule 83.10(b)(7). And,
13 again, that is for the protection of the public.

14 And, likewise, he shall submit to polygraph testing at his own
15 expense, as directed by the probation office, in order to determine
16 if he is in compliance with the conditions of supervision and also
17 to facilitate sex offender treatment. He must be truthful during any
18 polygraph examination in accordance with Local Rule 83.10(b)(8).

19 All residents and employment must be approved in advance by
20 the probation office, and he may not participate in any volunteer
21 activities requiring unsupervised contact with children under the
22 age of 18 without the approval of the probation office, in
23 accordance with Local Rule 83.10(b)(9).

24 The Court will also impose a search condition, and that is,
25 that he must submit his person, residence, vehicle, or any area over

1 which he exercises control, to a search conducted by the probation
2 office at a reasonable time and in a reasonable manner without
3 prior notice or search warrant in order to determine if he's in
4 compliance with the conditions of supervision.

5 And he must also warn anyone with whom he resides that the
6 premises may be subject to search pursuant to this condition.
7 That's in accordance with Local Rule 83.10(b)(10) and in
8 accordance with Sixth Circuit authority.

9 Likewise, he shall not possess or use a computer or any other
10 electronic device with access to the Internet or to any other online
11 computer service at any location, including employment, but that
12 would be only without the approval of the probation office, and
13 that would be in accordance with Local Rule 83.10(b)(11).

14 And then next, he shall not possess or use any data encryption
15 technique or program designed to conceal material that is illegal or
16 prohibited by the probation office, in accordance with Local Rule
17 83.10(b)(12).

18 He will be required to pay any financial penalty that's
19 imposed by the judgment, and that amount remains unpaid– or, I'm
20 sorry– if any amount remains unpaid at the commencement of the
21 term of supervision, he'll be required to pay on a monthly basis an
22 amount at least ten per cent of his monthly income. And he must
23 provide the probation office with access to any requested financial
24 information.

25 He may not incur any new credit charges or apply for

1 additional lines of credit without the approval of the probation
2 office until restitution has been paid in full. He may not enter into
3 contractual arrangements which obligate funds without the
4 probation office's approval.

5 In accordance with Title 18, Section 3565(b) and 3583(g),
6 they do require mandatory revocation of probation or supervised
7 release for the possession of a controlled substance or firearm or
8 for the refusal to comply with drug testing.

9 The Defendant is advised of those requirements of that title,
10 but in this particular case the Court will not impose mandatory
11 drug testing as a condition of supervision. It will be suspended
12 based upon my determination that Mr. Fout does not present a risk
13 of substance abuse in the future.

14 He will be required to pay the special assessment of \$200,
15 which will be due, in addition to the amount of restitution that was
16 previously ordered. But as announced earlier, he does not have the
17 ability to pay a fine, and, therefore, the fine requirement will be
18 waived.

19 In accordance with Rule 32(j)(1)(B) of the Federal Rules of
20 Criminal Procedure, the Court advises Mr. Fout that he has the
21 right to appeal the sentence imposed in the case. However, a notice
22 of appeal must be filed within 14 days of entry of the judgment.
23 Likewise, he's advised that if he requests to appeal, the Clerk of
24 Court can prepare and file a notice of appeal on his behalf.

25 And, likewise, if he does not have the ability to pay the cost of

1 an appeal, he may request permission to proceed in forma pauperis,
2 and he may also request to have counsel appointed to prosecute any
3 appeal on his behalf.

4 The Defendant will be remanded to the custody of the
5 Attorney General pending designation by the Bureau of Prisons.

6 Now, that's a lengthy sentence, lengthy conditions, but at this
7 time let me ask the attorneys three questions. My first standard
8 question is whether there is an objection to the sentence imposed.

9 My second question would be addressing issues of United
10 States vs. Bostic, and that would include objection to any of the
11 proceedings held in the case. Any objections not previously made
12 would need to be made at this time so that they could be addressed
13 by the Court and then properly preserved for review on appeal.

14 My third question is whether the parties would like the Court
15 to make additional findings to support the sentence that has been
16 announced. Mr. Morris, I'll begin with you.

17 MR. MORRIS: Your Honor, I would answer no to all
18 three of the Court's questions.

19 THE COURT: All right. Thank you. Mr. Hutson, of
20 course, you made objections earlier to the Court considering the
21 Internet chat information. It's not necessary for you to renew that.
22 That is an objection in the record, the Court considering that
23 information. Any other objections you would like to make?

24 MR. HUTSON: Yes, your Honor.

25 THE COURT: All right. You can proceed then.

1 MR. HUTSON: Thank you. Your Honor, we do
2 understand the Sixth Circuit Bostic decision. Our position is that
3 that decision does violate equal protection. But given the fact that
4 it is binding precedent, we do renew our objection based on the
5 legal arguments raised in our sentencing memorandum and our
6 motion for downward departure and/or variance.

7 Specifically, your Honor, I have several little notes here that
8 I've tried to jot down as we went today. First, Mr. Fout does
9 believe that this case falls outside the heartland. He is not the
10 typical defendant that is present in a child pornography case.

11 Secondly, your Honor, in terms of the departure analysis, the
12 Court carried out earlier, we do believe Steven is a particularly
13 vulnerable defendant. In terms of the statute itself, your Honor,
14 and his history and characteristics, it's our position that the Court
15 did not sufficiently consider Mr. Fout's medical records and
16 physical attributes and while, at the same time, placing an undue
17 emphasis on other parts of the case that, as of today, are
18 speculation in terms of whether he's low- functioning or not.

19 Steven is, according to the medical records presented by
20 probation in this case, a borderline low-functioning adult male.
21 Those facts are present in the pre-sentence report.

22 Now, I understand that there has been other evidence
23 presented today, and we would object just for purposes of the
24 record that that information has any indicia of reliability to
25 comport with due process. But we do raise that objection and

1 believe that Steven's history and characteristics do warrant a
2 variance in this case.

3 I would also add, your Honor, that we also object in that the
4 nature and circumstances of the offense should warrant a variance
5 as well. This offense occurred in 2009. There has been no evidence
6 presented today that Steven distributed or possessed child
7 pornography in nearly five years. This is a significant part of the
8 case in terms of whether a variance should be warranted.

9 And we do believe that the Court, while we understand that
10 this is a serious offense and Steven has accepted responsibility for
11 violating federal law, at the same time it's our position that the
12 Court may have placed undue emphasis on the seriousness of the
13 offense without examining the time frame that occurred from the
14 fact that the offense occurred in 2009. He wasn't indicted until
15 2010, and here we are today, in 2014.

16 That also relates to deterrence, under the statute. We believe
17 that the significant time frame that has passed does provide a
18 deterrent effect in this case, and we suggest that the Court did not
19 place enough emphasis on those factors, as well, while minimizing
20 some of the other issues that Steven presented to the Court.

21 Also, your Honor, just as a— for purposes of the record, the
22 Court's reliance on Sixth Circuit decision, the Bistline case, et
23 cetera, we do object on those grounds and believe that this case did
24 warrant a downward departure and variance regardless of the
25 higher standard that is currently present with the Sixth Circuit.

1 We make that objection in the event that the law should
2 change or there should be a new case that comes out. We want to
3 make sure that Steven is protected adequately in that regard.

4 Additionally, your Honor, in the pronunciation of the
5 sentence, the Court referenced Steven being involved with minors.
6 We believe that that has not been proven in this case. I do not see—
7 have not seen any evidence that comports with due process.

8 I understand the confrontation clause is somewhat limited in a
9 sentencing proceeding, but we would also raise a confrontation
10 clause objection to that issue as well in terms of how the Court
11 decided the case.

12 Your Honor, also the Court's decision relating to home
13 detention, this also— some of these issues overlap, but in terms of
14 home detention, we reiterate our position that home detention is a
15 viable source of punishment for a defendant.

16 The Court acknowledged that, I believe the Court stated that,
17 there has never been a blind child porn defendant in front of the
18 Court for a case like this, and that is an important aspect of the
19 case. And we believe that home detention could have provided a
20 sentence that is sufficient, but not greater than necessary, to satisfy
21 the combination of the statutory factors required in this case.

22 Additionally, your Honor, the current sentence pronounced by
23 the Court gives Steven a 12-year prison sentence. It is undisputed
24 that he is a blind defendant, a legally blind defendant, who has
25 been subject to abuse. Those records are— were submitted in terms

1 of the pre-sentence report. And we believe that any type of
2 sentence in a Bureau of Prisons facility that exceeds the statutory
3 minimum does, in itself, create a greater risk for a defendant like
4 Steven.

5 I understand Mr. Morris mentioned that there are protections
6 in the facility, but as someone who practices in federal court every
7 day, there are also assaults. And a defendant like Steven will
8 certainly be at a higher risk for injury in both sexual assaults and
9 assaults in general.

10 Lastly— not lastly, your Honor; lastly in terms of this section,
11 we also object to the Court’s conclusion that Steven has failed to
12 recognize the damage that he’s done in this case. Steven
13 immediately relinquished his computer at the scene in 2009. As far
14 as the evidence that we have in this case, there’s no indication that
15 he re-offended by distributing or possessing child pornography.

16 We submit to the Court that that is an indication that this
17 defendant is contrite in what happened in his case, and he does
18 accept responsibility for his actions.

19 In terms of how his allocution may have affected the Court
20 today, Steven, as documented by medical records, is a borderline
21 low-functioning adult male, and those are— that is a classification
22 given by a doctor, not simply a legal argument that an attorney is
23 making for his client.

24 In my interactions with Steven, I certainly have not gotten the
25 opinion that Steven is someone who would be able to carry out a

1 long allocution to determine his contrite nature for his offense in
2 this case. And I just say that for context of the type of defendant
3 that the Court is dealing with.

4 Lastly, your Honor, I realize the Court mentioned the chats
5 and said that the decision was not based upon the chats itself. But
6 the Court has referred to the chats as providing evidence that he is
7 not low-functioning. So, in that regard, in order to preserve the
8 issue, we do object to the sentence being based on that issue.

9 Lastly, your Honor, I do believe that the sentence of the Court
10 today does create a sentencing disparity under the statute, in
11 addition to the 30-year supervised release term. There are several
12 defendants– and we have cited a case in our memorandum– a
13 defendant like Steven, who lives at home, who is cared for by other
14 individuals, who needs assistance, but– and is also functioning at a
15 lower level, the Sixth Circuit case did find that a departure was
16 warranted in that case. And while it is a departure case, the Court
17 did, I believe, use 3553 analysis as well.

18 So, for those reasons, your Honor, we do object to the Court's
19 sentence today. We do want to make sure that Steven's appellate
20 rights are properly preserved, and we appreciate the Court for
21 allowing us make this long objection.

22 THE COURT: All right. In addition to the long
23 objection, which I will address here in just a moment, would you
24 like the Court to make additional findings?

25 MR. HUTSON: No, your Honor. Thank you.

1 THE COURT: All right. Let me address some of the
2 objections in the case. I do believe that I have adequately covered
3 the issue of the vulnerable defendant in the case and whether he
4 would meet the requirements of falling outside the heartland of
5 cases in Section 5K2.0, as well as the other sections for a
6 departure. Departures, of course, are different than variances, and
7 the Court's also considered these issues as a matter of a variance.

8 Typically, and I believe the attorneys here understand this,
9 typically, my starting point, when we look at the guidelines– and
10 they're not binding– is the middle of the guideline range.

11 Sometimes there are factors that would cause the Court to go above
12 the middle of the range and stay within the range and other times
13 would cause the Court to go below the range.

14 In this case, there are both of those factors; there are
15 mitigating factors and aggravating factors. The Court considers the
16 level of functioning of the Defendant in a couple of ways; one, his
17 proclivity or inclination to commit the offense that he's committed
18 here. Was he more inclined to commit the offense based upon a
19 lower level of functioning, number one; and, number two, does that
20 present an issue of recidivism in the future, going forward. So that
21 really cuts both ways in this particular case.

22 The Court certainly did consider the issue of the medical
23 records that were presented through the pre-sentence report and
24 also the physical attributes of the Defendant. We talked about
25 those quite a bit today, and the issue of whether they would rise to

1 the level of a departure, however, is a separate question.

2 There is no indication in the record that this defendant, that
3 his— although he’s legally blind, there’s no indication that his level
4 of sight will diminish from what it is now, going forward. He’s had
5 this condition for a number of years. He is able to read, with great
6 magnification, at a close distance.

7 While he fits the definition of being legally blind, he is able
8 to see, and he was able to carry out this particular offense in light
9 of his inability or his legal blindness. So the Court certainly
10 considers all of those issues.

11 Quite frankly, the Defendant benefitted from the Court not
12 making a specific finding as to the chats, other than the fact that
13 he’s not at the lowest level of functioning. The Court did not
14 consider the gravity of the chats, the specific information that was
15 included, because, if I did, I would be looking at a sentence higher
16 than the bottom of the guideline range.

17 The severity of this offense, the nature of these photographs,
18 ordinarily, would cause the Court to go much above the middle of
19 the guideline range, really more toward the upper end of the range.
20 But those mitigating factors that have been argued as being ignored
21 by the Court were actually used by the Court in imposing a
22 sentence at the bottom of the guideline range.

23 To say that home detention would be appropriate in this case
24 is to ignore the realities of the situation. I think it was Yogi Berra
25 that said, “In theory, there’s no difference between practice and

1 theory, but in practice there is.” And that’s what we have in this
2 particular case.

3 In practice, what happened was, this defendant was able to
4 commit offenses with his physical impairments within his mother’s
5 home, with his mother overseeing him to make sure that he didn’t
6 do it. So to impose a condition of home detention and say that
7 would be sufficient is just not an appropriate argument under the
8 facts that are presented.

9 Likewise, the time frame does not convince the Court. I
10 believe, if you go back and look at the pre-sentence report, you’ll
11 find that this defendant committed these offenses and then engaged
12 in this Internet chat afterwards that we have been talking about
13 here. And while the Internet chat itself– and I’ve not found that it’s
14 a type of a criminal offense, but it’s certainly an inclination– or an
15 indication that the Defendant would be inclined to commit offenses
16 if he had the opportunity to do so. So it certainly is relevant to the
17 issue of recidivism in the case.

18 And the Court does find, has found, that this was the author of
19 these chats, this defendant; that it’s not likely that someone
20 stopped in front of his house, used his wireless network to
21 somehow engage in this type of activity that he’s been engaging in,
22 a person who’s downloading pornography and also distributing
23 pornography. That’s just not a realistic argument.

24 Counsel is correct, however, that the Court did make an
25 incorrect reference to involvement with minors. While there is

1 some inclination— or some indication of charges, those are only
2 charges. There's no indication that he actually followed through
3 with that activity with the minor cousin. There's an inclination of
4 perhaps that he wanted to in the Internet chat, but there's no
5 indication that he did.

6 And if the Court found or thought that he did, quite frankly,
7 again, he would have been looking at a much higher sentence than
8 just the bottom of his guideline range. The other issues that have
9 been raised, I believe the Court has certainly addressed.

10 Counsel takes issue with the Bistline cases as setting a
11 different standard. In my reading, while Judge Graham certainly
12 believes that it sets a different standard because he's written a law
13 review article saying that it sets a different standard, but he was
14 reversed two times.

15 In my opinion, it doesn't set a different standard, but it
16 essentially follows what Congress intended, and that is for these
17 cases to be considered serious, because they are. They're very
18 serious offenses, and it's time that individuals begin to understand
19 that they are serious offenses and they will be dealt with seriously.

20 To impose a sentence of 60 months in a case such as this
21 would unduly diminish the seriousness of the offense and would
22 ignore the victims, the true victims, these children that are
23 depicted in these, in these photographs and these videos.

24 And that would be the Court's ruling with regard to the
25 objections that have been made under Bostic.

1 All right. Unless there are additional issues to be taken up, let
2 me see if there are before we announce a recess. Anything from the
3 United States?

4 MR. MORRIS: Nothing further, your Honor.

5 THE COURT: Mr. Hutson, anything else?

6 MR. HUTSON: No. Thank you, your Honor.

7 THE COURT: We'll be in recess.

8 (Hearing concluded at 4:04 p.m.)

C E R T I F I C A T I O N

I certify that the foregoing is an accurate transcript of the record of proceedings in the titled matter.

/s/ *Donnetta Kocuba*

3/14/14

Donnetta Kocuba, RPR-RMR
Official Court Reporter
U.S. District Court
Knoxville, Tennessee